

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 09 March 2006**

**BALCA Case No.: 2006-PER-1**  
**ETA Case No.: A-05171-08693**

*In the Matter of:*

**HEALTHAMERICA,**  
*Employer,*

*on behalf of*

**UTHAYASHANKER WIMALENDRAN,**  
*Alien.*

**Certifying Officer:** Arthur Reyes  
Atlanta FLC National Processing Center

**Appearance:** Shirin Egodage, Esquire  
Los Alamitos, California  
*For the Employer*<sup>1</sup>

**Before:** Burke, Chapman, Huddleston, Wood and Vittone  
Administrative Law Judges

**NOTICE OF DOCKETING**  
**AND**  
**ORDER GRANTING EN BANC REVIEW**

The parties are hereby notified that the Board of Alien Labor Certification Appeals ("BALCA" or "Board") has docketed an appeal in the above-captioned matter. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.

---

<sup>1</sup> Because the Employment and Training Administration no longer uses the USCIS G-28 form for entries of appearance by an attorney or agent, and the new ETA Form 9089 does not require that the attorney or agent state whether the scope of his or her representation includes only the Employer or the both the Employer and the Alien, it is unclear whether Ms. Egodage is representing only the Employer or both the Employer and the Alien. *See generally* 20 C.F.R. § 656.10(b)(1) and (3) (2005). Thus, Ms. Egodage should provide a statement with the Board clarifying her status vis-a-vis representation of the Employer and the Alien. A USCIS G-28 may be used for this purpose, but is not required.

The regulations governing permanent alien labor certification, although amended from time to time, had not changed in basic concept since Part 656 was published as a Final Rule in 1977. *See* 42 Fed. Reg. 3440 (Jan. 18, 1977). In December 2004, however, the Employment and Training Administration published a Final Rule deleting the prior language of 20 C.F.R. Part 656 and replacing it in its entirety with new regulatory text, effective on March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).<sup>2</sup> The new regulations substantially change the procedure for applying for permanent labor certification, and have the goal of ensuring the most expeditious processing of cases using the resources available. 69 Fed. Reg. at 77327. The new regulations are popularly known as the "PERM" regulations.<sup>3</sup> The above-captioned matter is the first PERM appeal docketed by the Board.

On June 29, 2005, the Employer filed an application for permanent alien labor certification for the position of Associate Financial Analyst. (AF 11-23).<sup>4</sup> On July 25, 2005, the Certifying Officer ("CO") denied the application under 20 C.F.R. § 656.17(e) on the ground that "[t]he application indicates that a Sunday edition of the newspaper of general circulation was available for the second required advertisement but was not used."<sup>5</sup> (AF 8-10). On August 22, 2005, the Employer filed a request for reconsideration by the CO and alternative request for review by BALCA. (AF 3-7). The Employer's

---

<sup>2</sup> Citations in this Order are to the 2005 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2005), unless otherwise noted. Because there are many pending permanent labor certifications applications filed under the old regulations, BALCA has created a new Case Number system to clearly delineate PERM and pre-PERM appeals. PERM cases will have the three letter designation "PER" in the Case Number. Pre-PERM cases will have the three letter designation "INA" in the Case Number.

<sup>3</sup> The PERM regulations emphasize streamlined electronic processing of applications. "PERM" is an acronym for "Program Electronic Review Management" system.

<sup>4</sup> "AF" is an abbreviation for Appeal File.

<sup>5</sup> Under Section 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving professional occupations require the sponsoring employer to attest to having placed two print advertisements "on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers." 20 C.F.R. § 656.17(e)(1)(i).

attorney stated that she had made a mistake in filling out the application. She had indicated on the application that the second advertisement was placed on March 7, 2005; however, that advertisement was actually placed on Sunday, March 6, 2005. In support, the Employer provided newspaper tear sheets.

The CO ruled on the motion to reconsider on February 24, 2006. (AF 1-2). The CO denied reconsideration on the ground that under 20 C.F.R. § 656.24(g)(2) "the request for reconsideration may not include evidence not previously submitted." The CO wrote:

The PERM regulation that took effect March 28, 2005 created streamlined procedures for filing and processing permanent labor certification applications. To achieve substantial reductions in processing times, PERM does not include a mechanism for correction or alteration of information after submission, but rather relies on employers and their agents to carefully prepare filings and attest at the time of submission to the application's accuracy. Requests for Reconsideration will only be granted when the mistakes were committed by the Department of Labor and resulted in an erroneous denial of an application. In this case, your application was properly denied. As explained in FAQ Round 5, posted on DFLC's website on August 8, 2005, if an employer wishes to change or correct information after filing an application, the employer should withdraw the application and file a new one.

(AF 1). The CO therefore forwarded the request for administrative review to BALCA, noting that a new application for the same alien and job opportunity cannot be filed while BALCA review is pending.

The Board received the Appeal File on February 28, 2006. Because this appeal presents an issue of first impression under a new regulatory scheme, the Board has, *sua sponte*, granted *en banc* review. The parties should brief all applicable issues; however, the Board directs that briefs specifically address (1) the proper interpretation of 20 C.F.R. § 656.24(g)(2) as it applies to this case, and (2) the relief available if it is determined that the CO should have granted reconsideration of the application. *See* 20 C.F.R. § 656.27(c).

The PERM regulations omitted the explicit statement of authority of BALCA to remand cases found in the pre-PERM regulations. *Compare* 20 C.F.R. § 656.27(c)(3) (2004). The regulatory history states that this omission was intended to deprive BALCA of the authority to remand cases. *See* 69 Fed. Reg. at 77363. In view of this intent, for purposes of this particular case, the Certifying Officer is directed in his brief to state whether, if the CO is found to have improperly refused to reconsider, the application would have been granted or whether it would have been subject to further processing before a decision would have been made to deny or grant certification.

The Board hereby:

**INVITES** the American Immigration Lawyers Association and the American Immigration Law Foundation to participate as *amici curiae*. 29 C.F.R. § 18.12. All persons or entities desiring to participate as *amicus* must file notice of intent within 30 days from the date of this Order.<sup>6</sup>

**ORDERS** that parties and *amici* file simultaneous briefs within 45 days from the date of issuance of this Notice and Order. Briefs shall not exceed thirty double-spaced, typewritten pages. The parties shall also indicate whether oral argument is requested. Oral argument will be held only upon approval by the Board. Reply briefs are not permitted.

At Washington, D.C.

For the Board:

**A**

**JOHN M. VITTON**

Chief Administrative Law Judge

---

<sup>6</sup> The Board has invited AILA and AILF as *amici* given their history of participation in BALCA *en banc* proceedings. Other interested organizations, however, are also invited to petition for *amicus* status.